SUPREME COURT, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1844

MARION BRUCE PHELPS, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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MARION BRUCE PHELPS, *Petitioner,*

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The Petitioner, Marion Bruce Phelps, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 10, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A to this brief. The

Order denying the Petition for Rehearing, and rejecting the Suggestion for Rehearing en banc, is attached as Appendix B to this brief. Next, the verdict rendered in the District Court is attached as Appendix C to this brief, and the Memorandum of Decision on the Motion to Suppress rendered by the District Court is attached as Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 10, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May Federal Agents, in executing search and arrest warrants, violently and forcefully kick in two doors of a private dwelling where they have knocked and announced, but have not been refused admittance, as required by Title 18 U.S.C. §3109?

2. Whether a mere 10 second or 15 second delay between announcement and violent breaking is a sufficient amount of time to justify the conclusion that admittance has been denied, where there is no assertion or evidence of some facts or circumstances allowing the officers to form a conclusion that admittance has been refused?

3. Where Federal Agents are required to, a.) knock and identify themselves, b.) state their purpose for seeking entry, and, c.) be *refused admittance* before forceably entering a dwelling, must there be some testimony or evidence that in fact admittance has been refused, either explicitly or implicitly.

STATEMENT OF THE CASE

On May 16, 1972, Marion Bruce Phelps was indicted in the United States District Court for the Northern District of California for violation of 21 U.S.C. §§841, 844 and 846, prohibiting the manufacture and distribution of controlled substances, to wit, Phencyclidine Hydrochloride (PCP).

Prior to trial, the Appellant and other co-defendants in the case moved to suppress all items of evidence seized on the primary grounds that Federal Agents had failed to comply with Title 18 U.S.C. §3109, which provides:

> "BREAKING DOORS OR WINDOWS FOR ENTRY OR EXIT. The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

On October 18, 1972, following several days of evidentiary hearings, the Trial Court granted two of the Motions to Suppress with respect to the simultaneous raids, but denied the Motion of Petitioner, Marion

Bruce Phelps. On November 3, 1972, after the Trial Court had admitted the evidence seized from the residence of the Petitioner, the jury returned a verdict of guilty as to three of the four counts. The Petitioner took an appeal from the Trial Court's refusal to suppress the evidence obtained from the raid, on the primary assertions that, (1) the Federal Agents failed to comply with Title 18 U.S.C. §3109, and, (2) by not proving any facts showing any exigent circumstances to justify a 10 second delay before forceable entry into the premises, the Government failed in their burden to excuse non-compliance with §3109.

On January 11, 1974, the Court of Appeals for the Ninth Circuit affirmed the judgment below.

And on April 10, 1974, after the Petitioner had petitioned the Court of Appeals for rehearing with a Suggestion for Rehearing en banc, the Court of Appeals entered an Order denying the rehearing and rejecting the Suggestion for Rehearing en banc.

STATEMENT OF FACTS

On April 4, 1972, the Petitioner, Marion Bruce Phelps, while sitting in a room of his home, heard a loud noise and almost instantaneously saw several armed men dressed in civilian clothes, come bursting through his door. According to Federal Narcotics Agents, they knocked at the front door of the Petitioner's residence several times and announced their identity and purpose. After waiting for approximately 5 to 10, and at most, 15 seconds, they simul-

taneously smashed into the front and side doors of the residence. In between the second knock and the breaking of the door, the Agents testified that they heard nothing distinguishable as an individual. Moreover, the Agents failed to see anything inside the house. No exigent circumstances or other reasons were given in the testimony as justification for breaking the door before affording the occupant reasonable time to reply.

Procedurally the Appeal arose from the Trial Court's refusal to suppress the evidence obtained from the raid conducted by the Agents, who had simultaneously broken into the front and side doors of the Petitioner's residence by kicking down the doors. On Appeal the Appellant asserted: (1) That the Federal Agents failed to comply with Title 18 U.S.C. §3109, and, (2) By not proving any facts showing exigent circumstances to justify a 10 second delay before forcefully entering the premises, the Government failed in its burden to excuse non-compliance with 18 U.S.C. §3109. In its brief on Appeal, the Petitioner contended that a forceful entry within seconds following an announcement is unreasonable and violative of §3109, where there is no allegation and proof of exigent circumstances presented to justify the forceable entry.[1] The

[1]Stamps v. United States, 436 F.2d 1059 (9th Cir., 1971); Corcoran v. United States, 427 F.2d 16 (9th Cir., 1970); United States v. Chase, 435 F.2d 733 (7th Cir., 1970); Sikes v. United States, 312 F.2d 332 (8th Cir., 1963); United States v. Whiting, 311 F.2d 191 (4th Cir., 1962); McClure v. United States, 332 F.2d 19 (9th Cir., 1964); United States v. Arguello, 368 F.2d 692 (3rd Cir., 1966); Masiello v. United States, 317 F.2d 121 (D.C. Cir., 1963); United States v. West, 326 F.2d 16 (2nd Cir., 1964); and United States v. Pratter, 405 F.2d 227 (7th Cir., 1972).

Panel, however, found that after hearing dogs barking[2] and movement,[3] the Agents forced open the door.

Not a scintilla of evidence of any exigent circumstances appears in the record, nor did any Agent testify as to any articulable facts showing exigent circumstances. Yet, the Court of Appeals concluded that the Trial Court had ample evidence to find substantial compliance with statutory requirement that the Agent had been refused admittance. In addition, the Panel of the Circuit Court of Appeals completely brushed aside the question of whether the Government justified its compliance with §3109 by introducing any articulable facts to show exigent circumstances. The Panel based its findings on the rationale that since there had been substantial compliance, there was no need for the Government to show exigency.

SUMMARY OF ARGUMENT

Title 18 U.S.C. §3109 provides statutory recognition of the extent to which the privacy of one's dwelling must be protected or, it codifies ancient principles of English Common Law in its efforts not only to protect the rights of private citizens from abusive Governmental conduct, but also it attempts to protect law enforcement and private citizens from the dangers of an un-

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[2]The Appellant refutes this finding by calling attention to the Trial Court's own finding in which one agent "heard dogs barking," another "heard no dogs," and the Trial Court concluded that there were some discrepancies in the testimony.

[3]Likewise, the Transcript fails to show any movement, and indeed, the Trial Court found none.

announced and unconsented to entry. Indeed, this very Court held in, *Miller v. United States,* 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958) that §3109 requires the prior knocking and announcing of officers, notice of their authority and purpose for entry, before any forcing of entry to a private dwelling. *Miller, supra,* left open the question of whether the unqualified requirements of the rule permitted any exception justifying non-compliance with each of the specific requirements of §3109. However, this Court in, *Kerr v. California,* 374 U.S. 23 (1963) formally recognized the notion that there may be exigent circumstances justifying non-compliance with the strict standards of §3109. While *Kerr, supra,* interpreted the California Penal Code, §844, it quite properly alluded to the Federal Standards. (See, also, *Sabbath v. United States,* 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968).

The test for determining non-compliance with §3109, and specifically whether there has been refusal of admittance, depends upon the circumstances in each case. While the circumstances may vary, it is clear that some fact other than a momentary lack of response to the knock and announcement has been present to justify the conclusion of constructive refusal. *McClure v. United States,* 332 F.2d 19 (9th Cir., 1964) *cert. denied* 380 U.S. 945 (1965).

The Petitioner's precise contention on appeal is that there were no circumstances in fact or in the record which would justify the officers breaking into the Petitioner's house after a mere lapse of 10 seconds

delay in answering the door. Even the District Court found discrepancies of the testimony of the Federal Agents and further stated emphatically that the break-in was unnecessary.

At no time has the Government argued that in fact, there was a refusal of admittance, either expressed or implied. Nor, did the Court of Appeals deal with this question in its opinion. The effect of this disposition is to place the Ninth Circuit in direct conflict with the Seventh Circuit which in almost identical facts, came to an opposite conclusion in the case of *United States v. Pratter,* 405 F.2d 277 (7th Cir. 1972). *Pratter, supra,* held that there must be some testimony or evidence or theory that in fact admittance has been refused, either explicitly or implicitly. The Court in *Pratter* said:

> "Moreover, as the Government also argues, there is a conflict in the testimony relating to the time between the officers' announcement and their actual entry. Nevertheless, none testified that he considered the interval long enough to justify the inference that admittance had been expressly or constructively refused. 405 F.2d at 232."

The seriousness to life, much less the liberty of private citizens, to say nothing of law enforcement agents, is the very issue which is before this Court, and requires the most rigorous application of Congressional standards and Constitutional principles.

REASONS FOR GRANTING THE WRIT

I. A CONFLICT OF OPINION EXISTS BETWEEN THE NINTH CIRCUIT COURT OF APPEALS AND THE SEVENTH CIRCUIT COURT OF APPEALS REGARDING WHETHER FEDERAL AGENTS MUST ARTICULATE SPECIFIC FACTS FOR NON-COMPLIANCE WITH ANY OF THE PROVISIONS OF 18 U.S.C. § 3109, WHICH PROVIDES FOR THE FORCEFUL ENTRY INTO A PRIVATE DWELLING FOR THE EXECUTION OF A WARRANT.

This case is governed by the application of Title 18 U.S.C. §3109. In pertinent part, the statute prescribes the method and manner of forcibly entering a premise for the purpose of executing a search warrant.

The eloquent and very decisive history and purpose of §3109 couched in the backdrop of the Fourth Amendment, is well traced in *Miller v. United States, supra:*

> "From the earliest days, the Common Law drastically limited the authority of law officers to break the door of a house to effect an arrest." 2 L.Ed.2d at 1337.

The leading Ninth Circuit case on the question of exigent circumstances justifying non-compliance with §3109 is, *McClure v. United States, supra.* In *McClure, supra,* the Court held that where Agents approached a premise, noticed the occupant observing their approach, saw the occupant get up and begin to run in the wrong direction, and heard footsteps inside the premises, their belief of escape justified their conclusion that their admittance had been or would be refused. Similarly, where the approaching Agents

heard a disturbance in the house, *Masiello v. United States,* 317 F.2d 121 (D.C. Cir. 1963) or where there were specific and articulable facts relative to the concern for the bodily safety of persons executing or aiding in the service of a warrant, as in *Alonzo v. United States,* 439 F.2d 991, (9th Cir. 1971), the termination of compliance is measured against the obviously significant facts.

However, the current decision of the Panel of the Ninth Circuit concludes that a short passage of time of less than a half a minute allows the belief that admittance has been refused. This creates a clear disparity of judicial opinion within the Circuits. The effect of this position is that the Ninth Circuit has articulated an opinion in the instant case which directly conflicts with the Seventh Circuit in the case of *United States v. Pratter, supra.*

The most telling point raised in *Pratter, supra,* is that *there must be some testimony or evidence or theory that in fact admittance has been refused.* The Seventh Circuit has clearly enunciated in *Pratter,* that the Agent must give some testimony that he considered the interval between the knock and announcement and the actual entry, long enough to justify an inference and a belief in his mind that admittance had been expressly or constructively refused. None of the Agents in the instant case testified that they considered that they had been refused entry.

This Court is therefore urged to resolve the conflict as to whether Agents must give some testimony or

evidence that in fact admittance has been refused when the Government seeks to excuse its non-compliance with 18 U.S.C. §3109.

II. THIS CASE PRESENTS AN IMPORTANT QUESTION REGARDING THE FUNDAMENTAL INTEREST OF PRIVACY, WHICH THE FOURTH AMENDMENT JEALOUSLY PROTECTS FROM UNLAWFUL AND VIOLENT GOVERNMENTAL INTRUSION.

> "Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of their house." *Miller v. United States,* 357 U.S. 301 (1958).

The genesis for this Constitutional notion finds its conception in the deepest roots of our Anglo-American history "The poorest man in his cottage did defiance to all of the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshhold of the ruined tenement!" (Remarks of William Pitt, the Oxford Dictionary of Quotation (2nd Edition, 1953), 379 quoted with approval in *Miller v. United States, supra,* 2 L.Ed.2d at 1337).

In the codification of this Common Law and Constitutional notion, Congress saw fit to insure that no forceful entries would be made in private dwellings with or without a search warrant or arrest warrant,

until the occupant has the opportunity to comply with the mandate of that arrest or search warrant. Thus Congess created 18 U.S.C. §3109.

This Court has recognized the importance of these fundamental questions regarding the interests of privacy under the Fourth Amendment. *Miller v. United States, supra; Kerr v. California, supra,* and *Sabbath v. United States, supra.*

It is undisputed in this case that the Agents knocked and announced, waited from 10 to 15 seconds, then forcibly entered the premises of the Petitioner without once making a determination of any sort or testifying to such that admittance had been refused. Since §3109 expressly mandates that prior to the breaking the Agents be refused admittance, the question before this Court is whether the mere passage of time may dispense with the statutory requirement that admittance has been refused.

To propose that Federal Agents may knock on the doors of private dwellings, wait a mere 10 seconds, and then form the unfounded and unarticulated conclusion that admittance has been denied so as to justify the use of force, is tantamount to repealing §3109 in toto and negating centuries of Common Law and Constitutional principles.

It is worth noting that, "regardless of how great the probable cause to believe a man guilty of a crime, he must be given a reasonable opportunity to surrender his privacy voluntarily." *United States v. Gable,* 276 F.Supp. 555 (E.D. Pa. 1967).

The firm command of the Fourth Amendment is well embodied in an old English principle that every man's home is his castle. Thus, while the king's men or sheriff, may break into the party's house, either to arrest the person or to carry out the process of the King, he cannot do so until the subject refuses him entry.

Professor Willgus has articulated this very same notion in his comment that, "before doors are broken, there must be a necessity for doing so and notice of the authority or purpose to make the arrest must be given, and a demand and refusal of admission must be made, unless this is already understood or the peril would be increased." Willgus, *Arrest Without a Warrant,* 22 Mich. L.Rev. 541, 798, 802 (1924).

III. THE COURT OF APPEALS MISCONSTRUED THE APPELLANT'S POSITION WITH RESPECT TO COMPLIANCE WITH 18 U.S.C. § 3109, AND THUS ITS OPINION IS BASED ON A MISAPPREHENSION OF THE LAW AND FACTS.

The Court of Appeals radically misconstrued the Appellant's contentions on appeal. By so misapprehending the nature of the appeal, it was inexorably forced into the erroneous conclusion which its decision reflects.

The Court characterized the essence of Appellant's argument as follows:

> "Appellant contends here what might be called a '10 second rule' *United States v. Phelps,* p. 7 of the attached Slip Opinion"

That is, the Court stated that the Appellant contended that the mere passage of 10 seconds of time following a knock and announcement is not compliance with §3109.

No such proposition was ever advanced by the Petitioner to the Court of Appeals, or for that matter, the Trial Court.

The Petitioner clearly articulated the legal proposition that a forced entry not preceded by a refusal of admittance is invalid under 18 U.S.C. §3109.

As a minor premise to the Petitioner's argument of non-compliance with 18 U.S.C. §3109, the Appellant properly and correctly asserted the proposition that a mere 10 second wait between announcement and breaking is an insufficient period of time to justify the conclusion that admittance has been refused, absent an assertion and evidence of some exigent circumstances allowing the officers to form their conclusion of refusal more quickly.

It is noteworthy that most of the case law and indeed, literature on the area of §3109 deals with the knock and announce requirements, and there is little direct attention given to the notion of refused admittance. Nonetheless, the Petitioner asserts that both the law and the analysis of the policy basis of the rule in §3109 supports the standard that entry is permissible simultaneous with or shortly after announcement, if there is a likelihood the occupants will attempt to escape and if non-forceable entry is possible; more specific instances of exigency are necessary if entry may be obtained only by physical destruction of property

and an explicit refusal of admittance or a significant lapse of time is necessary if the officers have no facts indicating exigency. *United States v. Bustamante-Gamez,* 488 F.2d 4 (9th Cir. 1973).

Despite this clarity of position, the Circuit Panel concluded that the simultaneous entry with knock and announcement was justified and thus its decision is based upon a misapprehension of the law and the facts.

The Court of Appeals clearly and unequivocally defined the issue upon which its decision rested when it stated:

> "We are faced with a narrow issue, but one of importance with those concerned with the proper application of a statute clearly designed to inhibit the overly-zealous intrusion into the sanctity of the home by officers overly eager to execute a warrant. The narrow issue is as follows: On this record can we hold as a matter of law that there was error by the Trial Court in finding that the Government Agent was 'refused admittance' so as to authorize him to 'break open any . . . door . . . of a house', within the meaning of 18 U.S.C. §3109? We think not and accordingly affirm the judgement of the conviction."

The Court of Appeals misconstrued the clear ruling of the Trial Judge and the admonition of Counsel because the Trial Court could not make a determination based upon the evidence before him. The significance of this argument is highlighted by the fact that not a scintilla of evidence is offered to suggest that the Agent and-or Agents who kicked down the doors,

formed a conclusion of any kind that admittance had been refused.

Moreover, at no time did the Government argue the fact that there was a refusal of admittance, either expressed or implied.

In short, the Trial Court, the Government, and the Court of Appeals, have determined that once a Federal Agent knocks and announces, he may dispense with the statutory requirement that admittance has been refused. Such is an erroneous statement of the facts of this case as well as the applicable law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
June 7, 1974.

Respectfully submitted,
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(Appendices Follow)

Appendix A

The United States Court of Appeals
for the Ninth Circuit

No. 73-1260

United States of America,
Plaintiff-Appellee,
vs.
Marion Bruce Phelps,
Defendant-Appellant.

[Filed Jan. 11, 1974]

Appeal from the United States District Court
For the Northern District of California

Before: Goodwin and Wallace, Circuit Judges, and Kelleher*, District Judge

Kelleher, District Judge:

Appellant and six others were charged in an eight-count indictment with conspiracy to manufacture and distribute controlled substances, in violation of 21 U.S.C. §§ 841, 844 and 846. Appellant was named in four counts: in count two he was charged with the sale of phencyclidine hydrochloride (PCP), a proscribed substance; in count three he was charged with a further and separate sale thereof on a later date; in

*Honorable Robert J. Kelleher, United States District Judge, Central District of California, sitting by designation.

count four he was charged with possession thereof with the intent to distribute; and in count eight he was charged with conspiracy to violate the laws of the United States pertaining to the possession and distribution of controlled substances.

The appellant and other defendants in the trial court moved to suppress all items of evidence seized as a result of simultaneous raids carried out in three separate locations. The primary grounds relied upon and with which we are here concerned, were alleged non-compliance with 18 U.S.C. § 3109, which provides:

> "BREAKING DOORS OR WINDOWS FOR ENTRY OR EXIT.—"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

After three days of pretrial evidentiary hearings, the trial court granted two of the motions to suppress but denied appellant's motion based on the search of his residence. This denial and the subsequent admission into evidence of the fruits of this search constitutes the basis of appellant's case on appeal. All the fruits of the search, admittedly, were highly probative of defendant's guilt of the charges of which he stands convicted; we treat the admission of the challenged evidence as prejudicial error if wrongfully admitted.

During trial, appellant's motion for judgment of acquittal with respect to the conspiracy charge of

count eight was granted. Thereafter, the jury returned a verdict of guilty as charged on counts two, three and four. Appellant moved for a new trial on the grounds that, *inter alia,* the introduction of evidence seized in the raid on appellant's home violated 18 U.S.C. § 3109. The motion was denied and appellant filed a timely notice of appeal from the judgment of conviction.

On appeal appellant asserts that: (1) the federal agents failed to comply with 18 U.S.C. § 3109, and (2) by not proving any facts showing exigent circumstances to justify a ten-second delay before forcible entry into the appellant's home, the government has failed to meet its burden to excuse non-compliance with 18 U.S.C. § 3109.

The only facts with which we are here concerned are those upon which the trial court based its findings in denying the motion to suppress evidence seized at the home of the appellant. Viewed, as it must be, in the light most favorable to the appellee, *Glasser v. United States,* 315 U.S. 60, 80 (1942), the evidence established facts as follows:

A daytime entry into appellant's residence in Burlingame was made by three federal narcotics agents who had warrants authorizing, respectively, the search of the premises and the arrest of appellant. One of the agents, at approximately 1:00 p.m., knocked at the front door of appellant's residence at least twice and loudly announced that he and the others with him were federal agents with a search warrant for the premises. After hearing dog-barking and movement,

but no other response, he forced open the door, entered the residence and in the kitchen found appellant who appeared slow to react, listless and apparently recovering from a dose of some unknown drug. An interval of five to ten seconds elapsed between the time that the agent first knocked and announced his identity and purpose and the time that he repeated this procedure; thereafter, another five to ten seconds elapsed and the agent then forced open the door and entered the premises. Another federal agent was at a side door of the premises, heard shouting at the front door, and entered the premises after the front door was forced and after the agents there made their entry.

Appellant here relies on his own testimony and that of other of his witnesses generally to the effect that there was no prior knocking heard by him or reacted to by his dog, as could be expected when a stranger knocked. The trial court apparently disbelieved this evidence as probative in any way of the absence of prior knocking. We cannot disturb this finding of the trial court unless convinced that it is clearly erroneous. *United States v. Page,* 302 F.2d 81, 85 (9th Cir. 1962) (en banc). We are not so convinced.

We are faced with a narrow issue, but one of importance to those concerned with the proper application of a statute clearly designed to inhibit the overly zealous intrusion into the sanctity of the home by officers overly eager to execute a warrant. The narrow issue is as follows: on this record can we hold as a matter of law that there was error by the trial

court in finding that the government agent was "refused admittance" so as to authorize him to "break open any . . . door . . . of a house", within the meaning of 18 U.S.C. § 3109? We think not and, accordingly, affirm the judgment of conviction.

Taken as a whole, powerful arguments and strong showings were made in the trial court by the several defendants in support of their various motions to suppress. But the power and strength of the several motions cannot be regarded in their totality so as to avail this appellant on his case here. Despite his efforts to persuade us by the record of other extraneous acts by other agents at other premises, we are constrained to consider only the evidence relating to the narrow issue of whether the forced entry of the appellant's premises was contrary to law; that is the only issue before us.

Appellant relies heavily for his case here on some of the occurrences and some of the acts of government agents related to raids, searches and seizures of residences other than his own, but of co-defendants. Many pages of his briefs are devoted to recitals of government action, and to an invitation to us to view the motion pictures of the "Garbersville Raid". We are sufficiently informed by the record to observe that in these other raids there appeared to be action by the officers which the law proscribes under section 3109 and otherwise. The trial court, quite properly, recognized this and granted suppression motions by the co-defendants in each case where illegality was shown. The related evidence, therefore, was neither offered

nor admitted against any defendant, including the appellant.

No matter what our view may be of illegal police action by other agents in other and even related raids, we cannot here impose sanctions therefor on the government or the agent here involved by denying the use of evidence properly obtained against the appellant. There is no applicable doctrine of guilt by association from which the action of the agent here involved may be tainted by shortcomings of other agents not here involved.

Appellant, in his briefs, makes clear in several ways his claim of attribution to the agent here of the sins of his fellows. Expressly, he refers to and relies on three raids, four broken windows, one dead man and other occurrences, all extraneous to the case before us. On such a basis he urges us to treat this case as one in which the exclusionary rule should be invoked as "a condemnation of the senseless violence and bloodshed which has stained these proceedings from their inception." We decline to do so because the case he seeks to make here is not the case before us.

The trial court adopted and applied the very high concepts and strong action espoused here by the appellant. Full consideration was given to each of the motions to suppress, the evidence offered was considered in support of each and there was applied the proper standard to all; the respective orders were highly discriminating and resulted in the application of sanctions where justified. The full measure of ju-

dicial condemnation was then applied where deserved; a stern warning was thereby given to federal agents concerning their wrongful conduct.

After oral argument and subsequent to submission of this case, the appellant informed the court of what is submitted as new and remedial "forced entry" regulations promulgated by the Drug Enforcement Administration subsequent to the events here involved. We conclude that all necessary remedial action has been taken, absent our judicial admonition. The standards promulgated were apparently anticipated by the trial judge. His rulings comported therewith.

We conclude that, taking all the circumstances shown by the evidence, the trial court did not improperly determine that the officer was "refused admittance" within the meaning of the statute.

We have reviewed the authorities on the question of whether some rule of law has evolved which lays down set rules as to the length of time an officer must wait before he may be deemed to have been "refused admittance" within the meaning of the statute. We are persuaded that proper construction rejects the set rule approach.

We are satisfied with the propriety and controlling effect of the rule as stated and applied by this court in *McClure v. United States*, 332 F.2d 19, 22 (9th Cir. 1964), *cert. denied*, 380 U.S. 945 (1965). This Court declared the rule as follows:

> "There are no set rules as to the time an officer must wait before using force to enter a house;

> the answer will depend on the circumstances of each case."

Appellant contends here for what might be called a "ten-second rule." He predicates his contention on his reading of the record that no more than ten seconds elapsed between knock and entry. We think that the record supports a finding of a slightly longer time interval. But it matters not that the record reveals ten, fifteen, or twenty seconds, for the true rule rejects time alone, even "an exceedingly short time," such as ten seconds, as the decisive factor. *See Jackson v. United States,* 354 F.2d 980 (1st Cir. 1965). See also, the recent holding of this Court in which approval was given to the opening of an unlocked door simultaneously with the announcement. *United States v. Bustamante-Gamez,* et al. (72-3188 and and 72-3189), October 24, 1973. This Court has recently approved a ten-second interval before forceful entry in circumstances no more exigent than here presented. *United States v. Keith Edward Allende,* et al., ... F.2d ....., (9th Cir. Nos. 73-1800, 73-1801 and 73-1802, decided November 5, 1973). We deem the decision controlling here.

Since we conclude that the Court below, on ample evidence, found substantial compliance with the statutory requirement that the agent be "refused admittance" there is no need to, and we do not, consider appellant's contention that the government failed to justify its non-compliance with that statutory requirement.

JUDGMENT AFFIRMED.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 73-1260
DC# CR 72-479 (WTS)

Marion Bruce Phelps, Appellant,
vs.
United States of America, Appellee.

[Filed Apr. 10, 1974]

ORDER

Before: Goodwin and Wallace, Circuit Judges, and Kelleher,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing, and Judges Goodwin and Wallace have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Dated: April 8, 1974.

*The Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

Appendix C

United States District Court
For the Northern District of California

Southern Division

No. CR 72-479 WTS

The United States of America
vs.
Marion Bruce Phelps

[Filed Nov. 3, 1972]

VERDICT

We, the Jury, find Marion Bruce Phelps, the defendant at the bar, Guilty on Count 2
Guilty on Count 3
Guilty on Count 4

Charles H. Byrne
Foreman

Filed Nov 3 1972, at 4:20 o'clock and 20 minutes P.M.

C. Trolliet
Deputy Clerk

Appendix D

United States District Court
Northern District of California

No. 72 479

United States of America, Plaintiff,

vs.

Judith Arnold, Edward Joseph Avennire, Dennis Michael Wood, Marion Bruce Phelps, William Lester Franklin, Reynold John Defreitas, Defendants.

[Filed Oct. 18, 1972]

MEMORANDUM OF DECISION ON MOTIONS TO SUPPRESS EVIDENCE

These motions to suppress evidence involve four separate entries into dwellings by agents of the Federal Bureau of Narcotics and Dangerous Drugs: (1) the Garberville-Alderpoint, Humboldt County cabin; (2) 2815 Hillside Drive, Burlingame, California; (3) 1724 D Street, Hayward, California, and (4) 24650 Amador Street, Building N. Hayward, California.

(1) The Garberville-Alderpoint cabin, Humboldt County

The Court finds that in execution of the arrest and search warrant the federal officers failed and neglected to either knock or to announce their authority and purpose before breaking and entering the dwelling house in question; the Court further finds that, as to this particular entry, there were no exigent circumstances sufficient to excuse such failure and the Court concludes that the federal agents did violate the provisions of Title 18 § 3109 which requires in effect (so far as pertinent in this case) that agents, making arrests or executing search warrants, may break their way into a house only if, after notice of their authority and purpose, they are refused admittance—either actually or constructively. The motion to suppress is, therefore, granted.

(2) 2815 Hillside Drive, Burlingame, California

According to one federal agent, he knocked twice on the wooden front door of the residence, with five second waits after each knock, heard some dogs barking, announced his authority and purpose and then broke the door open, entered the premises, arrested the defendant, Phelps, and searched the premises. According to the testimony of a second federal agent, who was assisting at a side door, he heard the announcement at the front door and also a commotion there—but heard no dogs. Then the agents at the side door knocked on the door, announced their authority and purpose and, receiving no response, broke the side door and entered to assist in the arrest and search.

Although there are some discrepancies in the testimony of the federal agents and, although the twofold breaking seems to have been unnecessary, the evidence is such that the Court cannot say that, under the circumstances, the agents did not wait long enough, as strongly contended by defendants, to determine whether they were being refused admittance—actually or constructively. We find that Section 3109 was substantially complied with. The motion to suppress is denied.

(3) 1724 D Street, Hayward, California

Although the front door, according to the testimony of the federal agent, appeared to be closed, the Court finds that it was unlocked and also actually ajar, and sufficiently so to be reasonably observable as such; that the federal agent, claiming to have knocked, actually, whether by knocking or pushing, caused the door to open sufficiently to reveal the defendant Franklin and others seated in plain view and apparently unarmed; that the federal agent and an assisting police officer thereupon entered the dwelling, guns drawn, without announcing their authority and purpose until after the entry and until almost simultaneously with the arrest of Franklin.

Defendants contend that entry under these circumstances was a violation of Section 3109, citing *Sabbath v. United States,* 391 U.S. 585 (1967) where, under virtually identical circumstances, the Supreme Court held that opening or pushing an unlocked door was a breaking within the meaning of the statute and that failure to announce authority and purpose *before*

breaking was a violation. Since in the pending case the government makes no serious claim of any exigent circumstances, excusing the failure to announce before breaking and entry, the motion to suppress must be granted.

(4) 2465 Amador Street, Building N, Hayward, California

As to this entry the motion to suppress is based upon the ground that the affidavit of Olsen, dated April 3, 1972, upon which the search warrant was based, was insufficient to show probable cause. The affidavit stated, in effect, that on February 24, 1972, defendant Wood, who had arranged previous sales of PCP with the agent, had moved to these premises; that on that date Wood was present and was arranging another PCP sale at those premises; that the agent then observed 50 PCP cigarettes (and also firearms) there; that on March 16, 1972, the agent again met Wood at his Hayward residence and again discussed the subject of PCP.

Defendant Avennire, who claims to have been a resident of the premises on April 4, 1972 (without suggesting that Wood may not also have been still a resident there) contends that this affidavit was insufficient to show probable cause for search of the premises on that date.

Considering the Olsen affidavit as a whole, we cannot say that the delay of the search from February 24, 1972 to April 4, 1972, pending a related, ongoing investigation by the agents, rendered the affidavit

stale as to the PCP observed on February 24, 1972. The Court reserves power, however, to rule at trial re any claimed unauthorized seizure of other items at these premises on April 4, 1972. The motion to suppress is denied.

The evidence pertinent to the four entries hereinabove considered suggests the importance of better instruction, training and discipline for narcotics agents in the proper manner of serving arrest and seizure warrants at private residences, as set forth in 18 U.S.C. § 3109, which statute is designed, not only to protect all home dwellers, good or bad, from mistaken or otherwise unlawful intrusions and from danger of unnecessary violence at the hands of law enforcement agents, but also, as noted by the Supreme Court in *Sabbath,* supra, to safeguard federal agents, themselves, who might otherwise be mistaken as marauders and thus be themselves endangered. Although use of some evidence in a few cases may be suppressed by the courts for violation of Section 3109, any resulting improvement in training and enforcement techniques will be worthwhile, for it has long been known that lawful enforcement, (as distinguished from overreaching and overreacting enforcement) is in the long run the most efficient and effective enforcement.

Dated: October 17th, 1972.

/s/ W. T. Sweigert
W. T. Sweigert
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1844

MARION BRUCE PHELPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of having sold (Counts II and III) and possessed with intent to distribute (Count IV) quantities of a schedule III controlled substance (to wit phencyclidine hydrochloride (PCP)), in violation of 21 U.S.C. 841(a)(1). He was sentenced to a term of three years' imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A).

1. The facts show that on January 27, 1972, Special Agent Eldon Olson, acting in an undercover capacity, met one Reynold DeFreitas in Hayward, California to negotiate the purchase of a quantity of phencyclidine hydrochloride (PCP). Olson again met with DeFreitas on February 2, 1972, who introduced him to Dennis Wood; the three negotiated for the purchase of one ounce of PCP for $800. The following day, Defreitas delivered 35.2 grams of PCP for which Agent Olson paid him $800.

On February 24, 1972, Agent Olson met with Wood to arrange for a second sale. Wood offered to sell the agent three ounces of PCP for $2,300 and placed a telephone call in the agent's presence dialing 343-6604;[1] he spoke to a person he referred to as "Bruce," and arranged for the delivery of PCP.

Shortly thereafter, surveillance agents observed petitioner depart from 2815 Hillside Drive, Burlingame and meet with Wood. Wood then returned and delivered 88.4 grams of PCP to Olson for which he paid $2,300.

The final sale took place on March 21, 1972, with Wood and petitioner engaging in the same procedure outlined above. After Wood met with petitioner, he returned to the agent and delivered five ounces of PCP for which Olson paid him $3,400. Petitioner was then observed returning to the Hillside Drive address.[2]

Based on these facts, federal agents obtained search warrants for petitioner's residence and three other locations in Northern California.[3] The warrants were executed simultaneously on April 4, 1972. At approximately 1:00 p.m., Special Agent Olson, in the company of other federal agents, went to the front door of petitioner's residence while other officers fanned out to the side and rear of the

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[1]Subsequent investigation revealed that this phone number was for the residence at 2815 Hillside Drive, Burlingame, California.

[2]Both Wood and DeFreitas entered pleas of guilty and were sentenced to terms of three years' imprisonment.

[3]Following a hearing the district court suppressed the use of evidence obtained by the government in execution of search warrants and arrest warrants at a location in Garberville, California and suppressed the use of evidence taken from the person of co-defendant William Franklin incident to his arrest in Hayward, California (Pet. App. D).

house (M. Tr. 230-232).[4] Olson testified at the hearing on petitioner's motion to suppress that he knocked on the door at least twice and loudly announced that he was a federal agent with a search warrant (M. Tr. 232, 237). Olson received no response, but "heard movement" (M. Tr. 234). After a wait of approximately five to ten seconds he knocked a second time and again announced his purpose and identity (M. Tr. 232-234). Special Agent Olson testified that he waited another five to ten seconds before forcibly entering the front door (M. Tr. 234); upon entering the residence he found petitioner in the kitchen (M. Tr. 235). Petitioner appeared to Olson to be slow to react, listless, and to be recovering from a dose of some drug. Olson further testified that shortly after observing petitioner, the second group of agents effected a forcible entry through the side door (M. Tr. 235, 244-245).

Petitioner testified that he was in the kitchen when Olson and other agents burst into the room and arrested him (M. Tr. 252, 254). He stated that he heard no prior knocking, nor did his dog respond in a manner he would have expected had there been knocking (M. Tr. 255).

As a result of the subsequent search, the agents seized various controlled substances including PCP, cocaine, lysergic acid (LSD), and marijuana. Also seized were certain necessary chemical formulae for the manufacture of illicit drugs, and $7,896 in cash including currency which Special Agent Olson had given Wood during one of the transactions.

2. Petitioner's sole contention is that in the course of executing a warrant for the search of petitioner's house, federal agents violated 18 U.S.C. 3109, which provides as follows:

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[4]"M. Tr." designates the three-volume transcript of the hearing on petitioner's motion to suppress, copies of which are being lodged with the Clerk of this Court.

BREAKING DOORS OR WINDOWS FOR ENTRY OR EXIT.

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

This contention was carefully considered and rejected by the district court and the court of appeals, upon whose opinions we rely. The district court, after receiving testimony and affidavits, denied petitioner's motion to suppress, finding (Pet. App. D, xii-xiii):

> According to one federal agent, he knocked twice on the wooden front door of the residence, with five second waits after each knock, heard some dogs barking, announced his authority and purpose and then broke the door open, entered the premises, arrested the defendant, Phelps, and searched the premises. According to the testimony of a second federal agent, who was assisting at a side door, he heard the announcement at the front door and also a commotion there—but heard no dogs. Then the agents at the side door knocked on the door, announced their authority and purpose and, receiving no response, broke the side door and entered to assist in the arrest and search.
>
> Although there are some discrepancies in the testimony of the federal agents and, although the two-fold breaking seems to have been unnecessary, the evidence is such that the Court cannot say that, under the circumstances, the agents did not wait long enough, as strongly contended by defendants, to determine whether they were being refused admittance—

> actually or constructively. We find that Section 3109 was substantially complied with. The motion to suppress is denied.

As petitioner acknowledges (Pet. 9-10), the federal agents were not required to await an express refusal before forcibly entering petitioner's residence after their announcement of purpose and authority remained unheeded. Here, as we have noted above, after knocking and loudly announcing their identity and purpose twice, and receiving no response, the officers heard the sound of "movement." In these circumstances, they could reasonably conclude that the occupants were seeking to escape and that they were being refused admittance; accordingly, the forcible entry was proper. See *United States* v. *Allende*, 486 F. 2d 1351, 1353 (C.A. 9), certiorari denied *sub nom. Montoya* v. *United States*, April 22, 1974, No. 73-5854; *United States* v. *Woodring*, 444 F. 2d 749 (C.A. 9).[5]

Contrary to petitioner's claim, the decision of the Seventh Circuit in *United States* v. *Pratter*, 465 F. 2d 227, is not in conflict with the holding in this case. In *Pratter*, customs agents went to defendant's residence with a warrant. While knocking on the door and announcing his purpose, an agent turned the door knob, found it unlocked, and entered the premises. The court concluded

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[5]Petitioner stresses the fact that here the officers waited only ten to fifteen seconds after knocking before they broke open the door. However, 18 U.S.C. 3109 imposes no set period of time which federal officers must wait prior to using force. Indeed to require officers to wait any specified time after an implied refusal would merely serve to permit destruction of evidence or facilitate escape. See *United States* v. *Allende*, *supra*, 486 F. 2d at 1353; *Jackson* v. *United States*, 354 F. 2d 980, 982 (C.A. 1); *United States* v. *West*, 328 F. 2d 16, 18 (C.A. 2).

that the entry was not in compliance with Section 3109 because no special circumstances existed from which a refusal could be inferred. In contrast, in the instant case circumstances existed from which the agents could conclude that they were being refused admittance. As the court of appeals (Pet. App. A, iii-iv), found:

> A daytime entry into appellant's residence in Burlingame was made by three federal narcotics agents who had warrants authorizing, respectively, the search of the premises and the arrest of appellant. One of the agents, at approximately 1:00 p.m., knocked at the front door of appellant's residence at least twice and loudly announced that he and the others with him were federal agents with a search warrant for the premises. After hearing dog-barking and movement, but no other response, he forced open the door, entered the residence and in the kitchen found appellant who appeared slow to react, listless and apparently recovering from a dose of some unknown drug. An interval of five to ten seconds elapsed between the time that the agent first knocked and announced his identity and purpose and the time that he repeated this procedure; thereafter, another five to ten seconds elapsed and the agent then forced open the door and entered the premises. Another federal agent was at a side door of the premises, heard shouting at the front door, and entered the premises after the front door was forced and after the agents there made their entry.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

DOJ-1974-09